Supreme Court of the United States.

October Term, 1923.

No. 242.

NASSAU SMELTING & REFINING WORKS, LTD.,
PETITIONER,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Brief for Petitioner.

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BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

On the 5th day of November, 1920, an involuntary petition in bankruptcy was filed in the United States District Court for the District of Massachusetts against the Brightwood Bronze Foundry Company (Rec. p. 1), and the said Brightwood Bronze Foundry Company was adjudicated a bankrupt on the 19th day of November, 1920 (Rec. p. 2).

Previous to the filing of the involuntary petition in bankruptcy, to wit, on the 10th day of September, 1920, the bankrupt made a general assignment for the benefit of its creditors to its attorney, Henry Lasker (Rec.

p. 3), and the assignee, down to date, has remained in possession of the assets of the bankrupt (Rec. p. 3).

The bankrupt filed schedules as is required by section 7, clause 8, of the Bankruptcy Act, and set forth in its schedules that it was indebted to the Nassau Smelting & Refining Works, Ltd., the petitioner, in the sum of $11,354.40 (Rec. p. 3).

On February 12, 1921, the bankrupt made an offer of composition to its creditors of twenty-five per cent (25%) cash; and, pursuant thereto, a meeting of creditors to consider the composition was held on February 25, 1921 (Rec. p. 3).

On March 17, 1922, a special meeting of creditors was held to elect a trustee, and one Harry M. Ehrlich was elected trustee, but never qualified (Rec. p. 3).

On the 27th day of March, 1922, over a year subsequent to the date of the meeting held to consider the composition, the bankrupt filed a petition in the United States District Court for the District of Massachusetts to be permitted to deposit, to meet the composition offer, a fund sufficient only to pay those creditors whose claims had been seasonably proved (Rec. p. 4).

The same day the Court issued an order that on the 6th day of April, 1922, before said Court at Boston, all known creditors and other persons of interest might appear to show cause, if any they had, why the prayer of said petitioner should not be granted (Rec. p. 4).

The Nassau Smelting & Refining Works, Ltd., the petitioner, on the 1st day of April, 1922, appeared and objected to the limiting of the amount of the deposit to only those creditors whose claims had been proved and allowed (Rec. p. 5). On the 8th day of May, 1922,

the District Court entered an order granting the petition of the bankrupt (Rec. p. 5).

The petitioner did not file or offer for proof its proof of claim within a year of the date of adjudication, but on the 6th day of April, 1922, the Nassau Smelting & Refining Works, Ltd., the petitioner, filed its proof of claim in order to share in the composition offer made (Rec. p. 3).

The District Court for the District of Massachusetts filed a memorandum of decision on the 5th day of May, 1922 (Rec. p. 6), ruling that section 57*n* of the Bankruptcy Act, that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," applied, and that the claim of the petitioner need not be provided for in the deposit to be made by the bankrupt to meet the terms of the composition offer (Rec. p. 5).

The Nassau Smelting & Refining Works, Ltd., the petitioner, being aggrieved by the order of the District Court limiting the deposit, filed a petition to superintend and revise in the Circuit Court of Appeals for the First Circuit (Rec. p. 11), and assigned as errors the following:

I.

That the United States District Court for the District of Massachusetts erred in granting the motion of the bankrupt that it be allowed to deposit, for its composition, only a sum sufficient to pay the composition dividend on claims proved and allowed.

II.

That the United States District Court for the District of Massachusetts erred in not requiring the

bankrupt to deposit a sum sufficient to pay the composition dividend on the total amount of claims scheduled (Rec. p. 7).

The case was heard in the Circuit Court of Appeals for the First Circuit, and the majority of the Court ruled that section 57*n* of the Bankruptcy Act applied (Rec. p. 14, and opinion of Bingham, J.).

The Court, on the 4th day of January, 1923, entered a decree affirming the order of the District Court (Rec. p. 21).

Anderson, J., wrote a dissenting opinion, ruling that 57*n* of the Bankruptcy Act did not apply to composition cases (Rec. p. 17).

On the 7th day of May, 1923, the Nassau Smelting & Refining Works, Ltd., filed a petition for certiorari in this Honorable Court, which petition was granted, and on June 30, 1923, the certiorari and return were filed (Rec. p. 22).

Argument.

I.

The effect of the composition proceedings under the Bankruptcy Act is to supersede the bankruptcy proceedings, and to substitute the composition proceeding for it.

Cumberland Glass Mfg. Co. v. *DeWitt Co.*, 237 U.S. 447:

> "It is thus apparent that, although the composition is provided for by the bankruptcy act, it is in some respects outside of the Act, for it is provided that, if the composition is not confirmed,

the estate shall be administered in bankruptcy, as in the Act provided."

Greenbaum v. *United States*, 280 Fed. 474 (C.C.A. 6th).

Merchants Bank of Mobile v. *Zadek et al.*, 84 So. R. 715; 45 A.B.R. 520:

"A composition is in a sense a substitute for bankruptcy proceedings, and in a composition the creditor gets, not his share of the bankrupt estate, but what he bargained for, and has no right to claim more. Cumberland Glass Co. v. DeWitt, 237 U. S. 447. An agreement of composition entered into by a number of creditors, each acting on the faith of the engagement of the others, will, in the absence of the statute, be binding upon them all; for each has the undertaking of the others as a consideration for his own engagement; and the creditor who breaks the agreement perpetrates a fraud upon those who adhere to it. 1 Smith's Lead. Cas. (9th Ed.) pp. 612, 628, 629. The effect of the Bankruptcy Act in this regard is to treat all creditors as a class and to enforce the will of the majority upon the minority. In other respects the right of contract remains unimpaired. Cumberland Glass Co. v. DeWitt supra."

American Improvement Co. v. *Lilienthal*, 184 Pac. R. 692; 44 A.B.R. 365.

II.

The bankrupt must deposit a sum sufficient to cover the composition percentage on all debts scheduled.

Bankruptcy Act, sec. 12*b*:

"The application for the confirmation of a composition may be filed in the court of bankruptcy, after, and not before it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, and which number must represent a majority in amount of said claims, and the *consideration to be paid* by the bankrupt *to his creditors*, and the money necessary to pay all debts which have priority and the expense of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the Judge."

It is to be noted that section 12*b* does not provide that the consideration is to be deposited only for creditors who have *proved* their claims.

Section 1, clause 9:

"'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy."

In re Simon Fox, 6 A.B.R. 525.
In re Harvey, 144 Fed. 901.
Lowell on Bankruptcy, p. 384.
Black on Bankruptcy, sec. 652.

III.

(A.)

Section 57*n* of the Bankruptcy Act, that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication," does not apply to composition proceedings.

In re Simon Fox, 6 A.B.R. 525, at 527:

"Creditors are not bound by the statutory period of one year from the original adjudication in bankruptcy in which to claim their respective shares," in composition proceedings.

At page 530:

"It is even doubtful whether the year's limitation for proving claims *against bankrupt estates*, laid down in section 57n, has any application to composition cases; no particular reason exists for requiring creditors to prove their claims at all, since the bankrupt is the only one who is interested in contesting them, and he is estopped by his schedules. . . . There being no necessity for proof of claims by creditors, what is the applicability of a limitation for proving claims? Moreover, the limitation only pertains to proof against a *bankrupt estate*, but in composition cases there is, technically speaking, no bankrupt *estate;* the estate has been given back to its original owner."

In re Harvey, 144 Fed. 901 (citing *In re Fox* with approval).

In re Aarons, 243 Fed. 634.

In re Englander's, Inc., 267 Fed. 1012.

In re Basha, 200 Fed. 951 (C.C.A. 2d).

In re Atlantic Const. Co., 228 Fed. 571.

In re Haley v. *Pope*, 206 Fed. 266 (C.C.A. 9th).

In re Watman, Komopolsky & Bernstein, 291 Fed. Rep. 886.

(B.)

There should be uniformity of procedure in compositions before adjudication with those subsequent to adjudication.

Section 57*n* can certainly not apply to compositions before adjudication because there is no date from which the time is to run. It certainly will be a benefit generally that composition proceedings be uniform, and it would be manifestly unwise to have one rule as to compositions before adjudication, and another rule as to compositions after adjudication (see dissenting opinion, Anderson, J., Rec. p. 19).

The purpose in having a meeting of creditors to vote on whether the composition shall be accepted or not by the creditors is merely to safeguard the minority.

> Bankruptcy. A Study in Comparative Legislation by S. Whitney Dunscombe, Jr.
>
> Vol. 2. Studies in History, Economics and Public Law. Columbia University. Page 85:
>
> "It is usually agreed that the debtor shall be given an extension of time in which to meet his engagements and shall be obliged to pay only a certain portion of his debts upon furnishing adequate security. If unanimity among the creditors was necessary for the purpose, it would be almost impossible to obtain a satisfactory arrangement. The will of the majority is, therefore, made to bind the minority, but to prevent injustice to individuals, the rights of the minority have been safeguarded as far as practicable. . . ."

Page 87:

"Since the composition compels the opposing creditors to accept what may be a very considerable reduction of their claims, the French legislation provides for their protection the safeguard of a double majority, a majority in number, so that the will of one or several important creditors will not be imposed upon the others, and a majority of three-fourths in value so that the small creditors may not subject the others to heavy losses. . . . To the minority, composed of dissenting and nonresident creditors, another protection is offered by the provision that the composition, although it has been regularly voted, will not be effected until it has received the . . . confirmation of the Court."

Page 101:

"In every country, it is to be noticed, that composition must receive the approval of a competent judicial authority."

It is submitted that composition originally arose in continental countries, and was adopted in England in the Bankruptcy Act of 1869. It first appeared in the United States in the amendment of 1874 to the Bankruptcy Act of 1867, which provided for composition after adjudication; and again in the Bankruptcy Act of 1898, where compositions after adjudication were provided for; and subsequently amended in 1910, providing for compositions before adjudication; in every case adopting the two safeguards provided for in continental countries, namely, a double majority.

In other words, the machinery of the bankruptcy court is used merely to effectuate the offer of the bankrupt (see opinion of Anderson, J., Rec. p. 18).

(C.)

The confirmation of a composition gives the debtor a discharge.

Bankruptcy Act, sec. 14*c*:

> "The confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Jacobs v. *Fensterstock*, 1 A.B.R. (N.S.) 14 (N.Y. Ct. of App.).
In re Mirkus, 289 Fed. 732 (C.C.A. 2d).

(D.)

A creditor who has not filed his claim may oppose a discharge.

Sec. 14*b* of the Bankruptcy Act:

> "The judge shall hear the application for discharge and such proofs and pleas as may be made in opposition thereto by the trustee or *other parties in interest.*"

In re Levey, 133 Fed. 572.

Haley v. *Pope*, 206 Fed. 266 (C.C.A. 9th), at 268:

> "In the case of re Barrager (D.C.) 191 Fed. 247, it was held that where certain persons were named

in the bankrupt's schedules as creditors that fact constituted prima facie evidence that they were creditors, and entitled to oppose the granting of the discharge; though they had not filed or made formal proof of their claims—citing numerous cases."

7 C.J. 369, sec. 652.
General Orders in Bankruptcy, 32.

(E.)

A petition for discharge must be filed within the next twelve months subsequent to adjudication, unless a further six months is given by the Court because of unavoidable delay.

Bankruptcy Act, sec. 14*a*.

(F.)

The statute does not limit the time for making a composition to that within which a discharge may be granted.

Loveland on Bankruptcy (3d ed.), p. 719.

Bankruptcy Act, 12*c*:

"A date and place with reference to the convenience of the *parties in interest*, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation."

Remington on Bankruptcy (2d ed.), vol. 3, sec. 2377:

"In general, the procedure on opposition to con-

firmation of a composition is similar to that on opposition to discharge."

Bank v. *Doolittle*, 107 Fed. 236.

Under section 14*b* of the Bankruptcy Act, referring to discharge, "parties in interest" can file objections to the discharge.

Bankruptcy Act, sec. 14*c*:

"The confirmation of the composition shall discharge a bankrupt from his debts. . . ."

Brandenberg on Bankruptcy (4th ed.), sec. 1213:

"A *party in interest* being anyone affected is entitled to be heard so that anyone having a provable claim, although it has not been proved and allowed . . . should be heard."

In re Walker, 96 Fed. 550.

It is therefore submitted that, as section 12*c* and section 14*b* of the Bankruptcy Act give to *parties in interest* the right to be heard and to file objections, a creditor who has a provable claim, even though it has not been allowed, can file objections to a composition offer.

(G.)

All creditors are entitled to notice of an application for confirmation of a composition.

Section 58*a* of the Bankruptcy Act does not limit notice of application for the confirmation of compositions to *only* those creditors who have proved their

claims. All creditors, even subsequent to a year from the date of adjudication, are entitled to notice.

IV.

Conclusion.

The petitioner respectfully submits that composition is an agreement by a bankrupt with his creditors to substitute for bankruptcy proceedings a private arrangement whereby each creditor is to get a definite sum bargained for, and that the whole composition proceeding is a substitute for bankruptcy, and that the machinery of the bankruptcy court is used merely to enforce the will of the majority upon the minority, but in all other respects the contract of the bankrupt with his creditors is unimpaired and can be enforced apart from bankruptcy proceedings. Therefore a creditor is not required to file his claim within a year from the date of adjudication in order to obtain the amount offered to each creditor in composition by the bankrupt.

NASSAU SMELTING & REFINING WORKS, LTD.,
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